Board of Alien Labor Certification Appeals

UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE: June 11, 1997

CASE NO: 95-INA-634

In the Matter of:

ELUFA FASHION, INC.,
Employer,

On Behalf of:

CHIN-HO TSAY,
Alien

Appearance: Jack Tran, Agent

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Chin-Ho Tsay (Alien), by Elufa Fashion, Inc., (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

Statement of the case. On November 10, 1993, the Employer filed this application for labor certification to enable the Alien, who is a national of Taiwan, to fill the employment opportunity position of "Wholesaler/Importer " in the Employer's Import/Wholesale Business at New York, New York. The duties of the position offered were described as follows in Form ETA 750:

> Imported merchandise from foreign countries like Hongkong, China, Taiwan. Arranged for purchase and imports through familiar agents and reliable exporters abroad. Instructed foreign agents and exporters to send specialized samples. Introduced new merchandise and explored domestic new markets.

AF 01-03, 12-13. The position described in the Employer's application was classified as an "Importer"[2] under Occupational Code No. 185.157-018[3] of the Dictionary of Occupational Titles, The salary offered was $34,833.33 per year for a forty hour week with no overtime for work from 9:00 A.M. to 6:00 P.M. The Alien's Immediate Supervisor will be the Manager, and the Alien will not supervise any Employees. The Employer stated as the educational requirement the completion of high school, and also required two years of experience in the Job Offered. The Other Special Requirement was that applicants for the job be fluent in Mandarin and Taiwanese.

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[2]185.157-018 WHOLESALER II (wholesale tr.) Exports domestic merchandise to foreign merchants and consumers and imports foreign merchandise for sale to domestic merchants or consumers. Arranges for purchase and transportation of imports through company representatives abroad and sells imports to local customers. Sells domestic goods, materials, or products to representatives of foreign companies. May be required to be fluent in language of country in which import or export business is conducted. May specialize in only one phase of foreign trade and be designated Exporter (wholesale tr.); Importer (retail trade; wholesale tr.).

[3]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

Alien's qualifications. The Alien, who was forty-five years old at the time of application, graduated high school in Taiwan in 1966, represented that he had worked as an importer in the Import/Wholesale business of C. W. Trading Company in New York, New York, from the beginning of 1989 to March of 1990, when he became employed in similar work by Shangosho International Co., Ltd, of Flushing, New York, where he remained until August 1991, when he was hired by the Employer to perform the job described in its application on his behalf, remaining in this position since that date. AF 01-02.

Notice of Finding (NOF). Although the resumes of twenty-two applicants were referred for this position by the New York State Department of Labor, no U. S. worker was hired. On March 13, 1995, the CO advised the Employer in the NOF that certification would be denied, subject to rebuttal on or before April 17, 1995. AF 109-111.

Citing 20 CFR §§ 656.20(c)(8), 656.21(b)(6), and 656.24 (b)(2)(ii), the CO noted that the Employer must document that the job at issue is clearly open to any qualified U. S. workers, and that, if a U. S. workers applied for the position, they were rejected solely for lawful job-related reasons. The CO then said the applicants Ho and Jacob appeared qualified by their resumes, that both of them were rejected by the Employer, and that no lawful job related reason for their rejection appeared of record. By way of rebuttal the Employer was directed to provide documentation that the applicants were not qualified, willing or available at the time of the initial referral and consideration of their applications for this position. AF 109-110.

Rebuttal. On April 13, 1995, the Employer transmitted its response to the NOF. The Employer's agency explained its rejection of Mr. Ho by saying,

> ... the employer points out that the experience of James B Ho is good enough in purchasing. However the qualified and ideal candidate they need must be good both in purchasing and marketing, as described in the job to be performed...sale to domestic merchants or consumers...sell imports to local customers. He (she) must be steady to buy the right thing at the right price and able to sell out swiftly thru an established and expanding network, which involves an excellent interpersonal skill in American market, an ability to distribute merchandise to reputable retailers willing to participate state-wide and eventually nation-wide, be well-informed and sensitive to locate the most economic source in China as well as in Taiwan in order to import the most competitive priced merchandise into the domestic market, and also be capable of selling well, fast, profitably, and successfully.

The Employer then contended that Mr. Ho did not have such credentials and that Ms. Jacob was qualified but was not sufficiently well informed by "a really good recognition and nation-wide personal commercial experience in China" to be considered qualified. AF 111-112.

Final Determination. The CO denied certification in the Final Determination (FD), dated May 5, 1995. AF 114-116. Having considered the Application, the NOF, and Employer's Rebuttal, the CO found that Employer did not meet the requirements of 20 CFR, Part 656, and that there are U. S. workers available who are able willing and qualified for this job and whose rejection by the Employer was for reasons that were not lawful and job-related. As to the rejection of Mr. Ho, the CO said Employer's criteria, as quoted above, were not measurable, and that it was unclear how the Employer could determine whether or not the applicant was qualified under this standard merely through a resume review or a telephone conversation. The CO then noted Employer's rejection of Mr. Ho and of Ms. Jacob on grounds that she lacked "personal commercial experience and contacts in China," and then said that both of them materially exceeded the Employers job requirements and concluded that both U. S. workers were rejected for reasons that were not lawful and job-related.

Appeal. By way of supporting its appeal the Employer later supplied evidence that after it rejected them, both of these applicants either had found a job or had decided they did not wish to work for the Employer. AF 121-123.

Discussion. The Employer has the burden of proof as to all of the issues arising under the Act and regulations, in view of the privileged status which certification would confer on the Alien in this case as an exception a statutory limitation on immigration for permanent residence and employment in the United States. The reason is that Certification is a privilege that the Act confers by giving favored treatment to specified foreign workers, whose skills Congress seeks to bring to the U. S. labor market to meet a perceived demand for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). This is expressly addressed in 20 CFR § 656.2(b), which quoted from § 291 of the Act (8 U. S. C. § 1361) the burden of proof that Congress has placed on Employers and Aliens seeking labor certification:

> Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act ... .

As the certification for the Alien that the Employer seeks under the Act as an exception to its broad limits on immigration into the United States, the evidence offered under the Act is strictly construed under the principle that

> Statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption.

73 AmJur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896)[4]. It follows that the Employer must present evidence that is commensurate with the favorable and advantageous treatment that it seeks in applying for special permission for this Alien to enter the United States lawfully and hold this position of permanent employment. **Japan Budget Travel International, Inc.,** 90-INA-277 (Oct. 7, 1991).

The Employer has the burden of proof on issues leading to a determination as to whether or not its rejection of U. S. workers was lawful. **Cathay Carpet Mill, Inc.**, 87-INA-161(Dec. 7, 1988)(en banc). In this case the Employer was directed to establish the lack of qualification of the applicants Ho and Jacob. First, there is nothing in the statements offered suggesting that either of these applicants was not available at the time their resumes were referred for the Employer's consideration for this job. Second, the Employer chose to produce evidence that these applicants had ceased to be available for the job long after they were referred to the Employer, notwithstanding the following explicit direction in the NOF:

> This is not to be considered a request for the employer to attempt to contact or interview the applicant. Documentation must be provided showing that the applicant was not qualified, willing or available at the time of initial consideration and referral.

AF 109. It is clear on the face of its rebuttal that the Employer has addressed an area of proof that is inconsistent with the order in the NOF. Even it these statements were responsive to the CO's order, however, they were not offered until they were made a part of Employer's request for BALCA review. **Capriccio's Restaurant,** 90-INA-480 (Jan. 7, 1992); **University of Texas at San Antonio**, 88-INA-071 (May 9, 1988). As such they cannot be considered in this proceeding. **ST Systems, Inc.**, 91-INA-279

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[4]In construing a tariff act, the Supreme Court there held that, "Such a claim is within the general principle that exemptions must be strictly construed, and that doubt must be resolved against the one asserting the exemption," citing its previous decisions in **People v. Cook**, 148 U.S. 397, 13 SCt 645; and **Keokuk & W. R. Co. v. Missouri**, 152 U. S. 301, 306, 14 SCt 592.

(Sept. 2, 1993); and see **Dharmanidhi Social Services,** 90-INA-467 (Aug. 4, 1992).

While the regulations required the Employer to exercise good faith in addressing the qualifications of the U. S. candidates who applied and were referred for the job at issue in this proceeding, it is concluded that the Employer failed to sustain its burden of proving that the applicants Ho and Jacob were was not qualified, willing or available at the time the resumes were initially referred to the Employer to be considered for this job opportunity. For these reasons it is concluded that the Employer failed to proceed in good faith in recruiting workers to fill the position at issue in that it did not demonstrate that its rejection of two U. S. applicants whose qualifications were not in question was supported by lawful job-related reasons. **H. C. LaMarch Ent. Inc**., 87-INA-607(Oct. 27, 1988).

Accordingly, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: ELUFA FASHION, INC., Employer
CHIN-HO TSAY, Alien

CASE NO : 95-INA-634

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: May 27, 1997